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Commissioner's Column

Greetings,

With the 2011 growing season upon us and, as is typically the case, there more work to do than the length of days (or typically the weather) allows, the issue of reliable access to farm labor has become a front-and-center concern for our local farmers. In fact it's a growing concern across the nation. Recent changes presented by a U.S. Department of Labor final rule for the H-2A Agriculture Worker Program purport to "strengthen worker protection for both U.S. and foreign workers and ensures overall H-2A program integrity."

Unfortunately, reports from the farming community have indicated that the changes to this important program have exacerbated grower concerns, caused delays in hiring, and negatively impacted members of our farming community. As a result of these recent concerns, several emails I have received, and the interests of MDAR associated with the strength and prosperity of our agricultural community, we are pleased to convey the following "Special Report" from one of our guest columnists that summarizes the changes that have been made and provides some guidance for those who are concerned about the efficacy of the H-2A Agriculture Worker Program.

Best,

Scott J. Soares, Commissioner
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Special Guest Column

Changes to the H-2A Final Rule: What They Mean for Agriculture Employers in Massachusetts

By Brenda J. Smith, J.D.

Agriculture employers in Massachusetts who participate in the H2A Farm Labor Program have noticed a shift in procedures and enforcement recently. This shift is impacting farms and agriculture employers in Massachusetts and across the country. The intent of this article is to help clarify what the shifts are and the impact to farms and farm labor throughout the state.

What has changed and why?

In February of 2010 the Department of Labor issued the Final Rule for the H-2A agriculture worker program. This Final Rule has a number of changes for agriculture employers. The stated reason for the changes is that they "strengthen worker protection for both U.S. and foreign workers and ensures overall H-2A program integrity."

It is important to note that this stated change is in line with other immigration enforcement measures enacted by the federal government. Immigration Customs Enforcement which is in charge of enforcing the immigration laws against employers has adopted a policy of increased audits and enforcement. The stated reason for these changes is to "protect" the U.S. workforce and ensure only qualified workers legal to work in the United States are hired.

What is the impact to agriculture employers?

The impact of these changes is very real, frustrating and costly to agriculture employers. And Massachusetts is not the only state grappling with the effects of these changes. As an agriculture employer who participates in the H-2A program you will see the following changes:

1. You will have to hire domestic H2A workers for up to 50% of the work contract period.

Many Massachusetts Agriculture Employers are experiencing an increase in workers being sent from local State Workforce Agencies (SWA). They are being required to hire all domestic workers sent to them regardless of experience.

An advisory issued by the US Department of Labor in February of 2011 states the following:

"As long as a foreign H-2A worker is employed in a certified position during the first 50 percent of the contract period, the employer must provide employment to any able, willing qualified and available U.S. worker who applies to the employer until 50% of the period of the work contract has elapsed, regardless of the number of H-2A workers covered by the employer's certification."

2. The 2010 Final Rule requires employers to begin recruiting U.S. workers before filing their H-2A applications with the Department of Labor.

An agriculture employer participating in the H-2A program will be required to initiate pre-filing recruitment 75-60 days before the employers first date of need. So this means before you even begin the process of becoming an H-2A employer you must recruit domestic workers for the available positions.

3. Employers must pay the highest applicable rate of pay.

This is a change from the 2008 Final Rule, and the implication to an agriculture employer is

increased labor cost. You must pay the highest applicable wage rate, whether it is the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate.

4. Agriculture employers will experience an increase in enforcement actions for violation of the H-2A Final Rule requirements.
The H-2A Final Rule increases program integrity through strengthened audit, revocation and debarment procedures, and financial penalties.

5. The State Workforce Agencies will no longer complete I-9's and verify the employment eligibility of applicants.
Under the 2010 Final Rule SWA's will no longer be required to conduct I-9 employment eligibility verification. This means this SWA's may refer domestic or foreign workers who have not been vetted for employment eligibility. What this means for agriculture employers is that they MUST diligently and accurately complete all I-9's and verify eligibility.

What is the future and what can you do?
The future of the H-2A program is in limbo, and some may argue that the future of US agriculture is in limbo because of this. The best way to make a difference is to be heard and be an active voice of opposition to the current and proposed changes. Attached is a link to recent congressional hearings on the H-2A program. These hearings indicate where Congress would like to take the program. judiciary.edgeboss.net/wmedia/judiciary/.../immi041311.wvx

A helpful resource and organization for all agriculture employers is the National Commission of Agriculture Employers (NCAE); and finally you may contact me with any questions regarding the current and proposed changes. I have been working with agriculture employers across the country as they grapple with the impact of these changes to their H-2A program and their business.

Brenda J. Smith, J.D. is the Founder and CEO of The Brenda J. Smith Company; a national legal consulting firm specializing in helping clients create and implement successful employment and immigration compliance programs. The firm represents agriculture employers throughout the United States. The company offices are based in Salem, MA. She can be reached at brenda@brendajsmithcompany.com; 978-594-8373(o); www.brendajsmithcompany.com.

MDAR's mission is to ensure the long-term viability of local agriculture in Massachusetts. Through its four divisions – Agricultural Development, Animal Health, Crop and Pest Services, and Technical Assistance – MDAR strives to support, regulate, and enhance the Commonwealth's agricultural community, working to promote economically and environmentally sound food safety and animal health measures, and fulfill agriculture's role in

energy conservation and production. For more information, go to www.mass.gov/agr or follow us at www.twitter.com/agcommishsoares for the latest agricultural trends and updates. To keep up to date on workshops and events, visit www.mass.gov/agr/events/coming_up.htm.